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1977

# Ronald G. Mitchell and Kathleen H. Mitchell v. Doyal Evan Stewart and Karen Lee Stewart : Brief of Appellants

Utah Supreme Court

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McCune & McCune; Attorneys for Appellants;

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

-----  
RONALD G. MITCHELL and  
KATHLEEN H. MITCHELL, his wife, )  
Plaintiffs and Appellants, )

vs. )

DOYAL EVAN STEWART and  
KAREN LEE STEWART, his wife;  
and STEWART & CO., INC., a  
Utah corporation, )

Defendants and Respondents. )

Case No.  
15285

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BRIEF OF APPELLANTS

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Appeal from Judgment of Fourth Judicial District  
Court, Utah County, State of Utah, Honorable  
George E. Ballif, District Judge

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FILED

SEP 2 1977

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### Legend

T = Transcript

R = Record

IN THE SUPREME COURT OF THE STATE OF UTAH

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RONALD G. MITCHELL and	)	Brief
KATHLEEN H. MITCHELL, his wife,	)	of
	)	Appellants
Plaintiffs and Appellants,	)	
	)	
vs.	)	
	)	
DOYAL EVAN STEWART and	)	
KAREN LEE STEWART, his wife;	)	
and STEWART & CO., INC., a	)	
Utah corporation,	)	Case No.
	)	15285
Defendants and Respondents.)	)	

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STATEMENT OF THE KIND OF CASE

This is an action by appellants to recover damages for defective home construction and counterclaims by respondents for an accounting and trespass.

DISPOSITION IN LOWER COURT

After consolidated trial with Civil No. 43137, Edward W. Barney and Helene Barney, Plaintiffs vs. Doyal Evan Stewart, et al., Defendants, Barneys were granted judgment against Defendants and Respondents in the sum of \$1,615.00 for Breach of Warranty for defective construction, the two counterclaims of Defendants - Respondents against Plaintiffs - Appellants were dismissed no cause of action and Plaintiffs - Appellants complaint against Defendants was dismissed on the grounds

damage had not been proven because Appellants had sold the home since its purchase from Respondents.

#### RELIEF SOUGHT ON APPEAL

Appellants seek a remand of the case to the trial court to determine damage for defective construction based upon the proper rule for measure of damage in implied and expressed breach of warranty cases which is the cost of repair plus the loss of use and other damage consequently incurred as the result of the breach.

#### STATEMENT OF FACTS

Respondents developed, constructed, and sold to Plaintiffs as the initial occupants a home situate on property located in Panguitch, Utah County, Utah. (R42) The deed to said home was recorded on March 12, 1974. (R42)

About the same time, Plaintiffs - Appellants also contracted with Defendants - Respondents to complete the basement of said home and convert the carport into a garage. (R60) Said contract was separate and apart from the original contract for the sale of the home. (R61; T36; 16-24)

Plaintiffs moved into the home in about March 1974 (T36: 2-9) and discovered various defects in the roof which caused leaking (T16, 23, 24); a settling front porch and sidewalk (T17: 9-13); a peeling and chipped driveway (T17: 21-24);

unsealed overhanging floor joist and windows which caused drafts (T25); improperly hung doors (T28-29); and improperly located kitchen cabinets (T28-29).

After each defect was discovered, Plaintiffs - Appellants notified Defendants - Respondents of the problems (T17:1; 17:15; T35).

At the same time Plaintiffs - Appellants moved into the home, Plaintiffs - Appellants built a retaining wall. (T16:6)

The defects discovered by Plaintiffs - Appellants caused leaking in their home (T16); uncomfortable winter months (T25); and the inconvenience in use of doors and cabinets (T29-30).

Plaintiffs - Appellants resided in said home for over 2 1/2 years until August 1976, when they sold same to Robert Boisen. (T38:24-30)

Prior to trial, an original Defendant State Savings & Loan Association, a corporation, was removed from the case through Stipulation and Order of Dismissal. (R37)

At the consolidated trial herein of this case and Civil case No. 43137, Barney v. Stewart, et al, numerous witnesses were called and roof shingles and nails entered into evidence by Plaintiffs - Appellants to show the defective construction alledged. (R32-36)

During the trial, Plaintiffs - Appellants objected to all testimony admitted regarding the subsequent sale of Plaintiffs - Appellants' home by Plaintiffs - Appellants to a third party. (T38:18; 39:2; 39:16-20) The first counterclaim of Defendants - Respondents was dismissed for failure to prove damages (T48:21-30; 49:1-23; 61:5-11) and the second counterclaim of Defendants - Respondents was dismissed for failure to show that the retaining wall constructed by Plaintiffs - Appellants trespassed on property owned by Defendants - Respondents. (T48:10-20) Then, at the close of the evidence, Plaintiffs - Appellants moved the court for an order pursuant to Rule 37(c), Utah Rules of Civil Procedure, as amended, entitling Plaintiffs - Appellants to reasonable costs and expenses including reasonable attorney fees for proving facts denied by Defendants - Respondents in Request for Admissions. (T63-64)

The court took the cases under advisement (T64; R36) and on April 27, 1977, rendered its memorandum decision granting Defendants prior Motion to Dismiss stating among other things: "that Plaintiffs have failed to prove that they suffered any damages as a result of the alledged defective construction, and because they, without repairing same, sold the property prior to the time of trial and failed to establish that



they received less from the sale than they would have received had the Defendants constructed the home in a manner acceptable to them and without the conditions they complain of herein. Also, Plaintiffs did not advise the purchaser of the alledged defects they complain of in this action," (R Supplemental Record on Appeal), and on May 26, 1977, signed and entered its Findings and Conclusions which stated in part, "there is no evidence in the record that the sales price would have been greater had the defects which Plaintiffs claimed to have been present, not existed. The record is devoid of any evidence from which the court could conclude that the market value of the lot and residence or that the sales price would have been greater without the claimed defects," (R17:1-6) stating in its conclusions its measure of damages as "the proper measure of damages to the Plaintiffs had Plaintiffs suffered any damage would have been the difference between the value of the residence purchased by them with and without the claimed defects or if the Plaintiffs retained ownership of the property, the cost of remedying the defects." (R17:17-21), and dismissing Plaintiffs - Appellants Complaint by its Decree dated May 26, 1977. (R15)

## POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY CONSIDERING EVIDENCE REGARDING PLAINTIFFS' SUBSEQUENT SALE OF THE HOME ORIGINALLY SOLD BY DEFENDANTS DOYAL EVAN STEWART AND KAREN LEE STEWART TO PLAINTIFFS.

The main question to be decided by the court in this action is whether the subsequent sale of a home by initial purchasers of same affects the initial purchaser's right to recover damages against the original developer-builder for defective construction.

The court mistakenly was unable to distinguish the initial sale of the new construction to Plaintiffs - Appellants and the subsequent sale of said construction to third parties as two separate transactions. The court consolidated two cases regarding two homes constructed by Defendants - Respondents and awarded damages for defective new construction to Barneys in Civil No. 43137, Barney v. Stewart, et al, but denied Plaintiffs - Appellants the right to damage since they had sold their home prior to trial.

In arriving at the conclusion that Plaintiffs - Appellants were not entitled to damage, the court mistakenly heard testimony regarding said subsequent sale and therefrom found the following in its memorandum decision:

... Plaintiffs have failed to prove that they suffered any damage as a result of the alledged defective construction, and because they, without repairing same, sold the property prior to the time of trial and failed

to establish that they received less from the sale than they would have received had the Defendants constructed the home in a manner acceptable to them and without the conditions they complain of herein. Also, Plaintiffs did not advise the purchaser of the alledged defects they complain of in this action. (R Subsequent Record on Appeal)

The court further ironically found:

There is no evidence in the record that the sales price would have been greater had the defects which Plaintiffs claimed to have been present not existed. The record is devoid of any evidence from which the court could conclude that the market value of the lot and residence or that the sales price would have been greater without the claimed defects. (R17)

The trial court then went on in its conclusions to create its new and novel measure of damages for injury to real property stating as follows:

The proper measure of damages to the Plaintiffs had Plaintiffs suffered any damage would have been the difference between the value of the residence purchased by them with and without the claimed defects or if the Plaintiffs retained ownership of the property, the cost of remedying the defects. (R17)

The Well Established Criteria for Determining Damage to Real Property is Whether the Damage is Temporary or Permanent.

Our own Utah Supreme Court, the Restatement of the Law of Contracts, recognized treatises, and other jurisdictions hold to the same rules. Although stated in minor varing words, the same underlying rule is: In the event injury to real property is temporary, the measure of damage is the reasonable cost of repair plus any consequential or incidental damage, and if the injury is permanent, the

measure of damage would be the difference between the value

immediately before and the value immediately after the injury.

Our Utah Supreme Court held to this above rule in Fuhriman, Inc. vs. Jarrell, 21 U2d 298, 445 P2d 136 (Utah 1968) in which the court held:

The measure of damages for improper water proofing of foundation was correctly based on the cost of repair even though the trial court incorrectly described damages as diminution in market value of dwelling.

The State of Washington in a new-construction breach of warranty case decided that damages to be allowed for breach of warranty in construction of a new house would be for the cost of repair and such other damage as was proved to be the direct result of the breach and damages should not have been awarded on the basis of the difference in value of the property before and after. Christensen vs. Hoskins, 397 P2d 830, 65 Wash. 2d 417 (Wash. 1964).

The Restatement of the Law of Contracts, Section 346(1) regarding damages recoverable for breach of a construction contract is often quoted by the courts, and was so quoted in both our Utah Fuhriman case and the Washington Christensen case. Said restatement section states:

- (a) For defective or unfinished construction he can get judgment for either

- (i) The reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste or
- (ii) The difference between the value that the product contracted for would have had and the value of performance that has been received by the Plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

McCormick in his treatise on damages also states the rule as follows:

In whatever way the issue arises, the generally approved standards for measuring the owner's loss from defects in the work are two: First, in cases where the defect is one that can be repaired or cured without undue expense, so as to make the building conform to the agreed plan, then the owner recovers such amount as he has reasonably expended, or will reasonably have to expend, to remedy the defect. McCormick on Damages, Section 168, Page 648.

On the other hand, if the expenditure for reconstruction is disproportionate to the end to be obtained or would endanger unduly other parts of the building then the measure of damage would be "the difference between the value of the building as it is and what it would have been worth if it had been built in conformity with the contract."

McCormick on Damage, Supra.

American Jurisprudence states the generally accepted rule as follows:

Most courts take the view that the measure of damages for temporary injuries (to real property) is the cost of repairing the damage or restoring the property to its original condition. 22 Am. Jur.2d, Damages, Section 135 and 336 (also Colella vs. King Company, 72 Wash. 2d, 433 P2d 154.)

The same rule is stated in Corpus Juris Secundum thus:

The measure of damages for a permanent injury to real property is generally the fair value of the property immediately before and immediately after the injury. The recovery for a temporary injury to real property is measured by the loss sustained to the owner and may include the cost of restoration if less than the difference in value, and the diminution in the value of the use and enjoyment or rental value of the property during the term the injury exists. 25 C.J.S. Damages, Section 84.

Plaintiffs - Appellants can in their search find no precedent for the proposition that the subsequent sale of the home originally purchased would require the application of the permanent damage or excessive economic waste rule requiring a determination of diminution in value of the property at the time of the injury, and certainly cannot find any precedent for the proposition that if a person subsequently sells a defective item, he must show that he could have sold the item for more if the item had not been defective.

#### Damage is Determined at the Time of the Injury.

The point in time when damage is determined is when the injury occurs. When an individual falls from a horse he is injured at the time of the fall. When an individual receives a defective iron, he is injured at the time he is delivered the iron. When an individual receives a defective home, he is

injured at the time the home is delivered. The damage accruing to an individual who contracted to receive an item but received less than he contracted for is the loss of the benefit of the bargain. He expected to receive and bargained to receive something which he did not fully receive.

The amount of damage which an individual suffers must be determined at the date of the injury plus any further damage which flows from the original injury. This general rule has been stated as follows:

As a general rule, the damages upon breach of contract are to be measured as of the date of the breach. Under this rule, fluctuations in value after breach do not affect the recovery allowed. 22 Am. Jur.2d, Damages, Section 52; Gaylord Bulder vs. Richmond Metal Manufacturing Corp., 140 A2d 358 (Pennsylvania 1958).

The price at which a home was sold 2 1/2 years later cannot be used as the base price from which damage is computed. Nor can the value of the home 2 1/2 years after it was originally delivered to Plaintiffs - Appellants be considered in determining whether damage occurred 2 1/2 years previous.

Predicating a Person's Right to Recover Damages for Defective Construction Upon Whether or Not He has Possession and Ownership of the Defective Property at the Time of Trial, is Arbitrary and Capricious.

The trial court in this case heard two consolidated

actions regarding construction of two homes located across the street from each other. Both homes were constructed by and developed by Defendants - Respondents. The court granted a judgment for damages to the Barneys who still maintain possession and ownership of their home, but stated through its decision, Findings, and Conclusions that because the Mitchells had sold their home prior to trial, the Mitchells would have to show that they could have sold their home at a higher value if the damages did not exist. Such a requirement is arbitrary and capricious, discriminatory and illogical.

The mere fact that an individual sells his home which was originally delivered to him in a defective condition, should not require that individual to show how much the home had appreciated in value over the period of time in which he had held possession, how much improvements he had put into the property, how much the basis of his property had been increased from the initial purchase, and what the home would have subsequently sold for had there not been any defects. If this were the rule to be applied, then the Barneys who recovered damages for reasonable repair costs should have been required to also show how much their home had increased in appraised value, how many improvements they had put into the home, etc., for the only difference between the two sets of



was the fact that one still had their home and the other had sold it.

Moreover, even if the defects in the home of the Plaintiffs - Appellants were permanent and irreparable, the value of the home at the time of possession would be the relevant factor before the court. The value at which the home was sold 2 1/2 years hence would not be relevant to determine that original value. It has been said:

In order to be relevant, evidence on an issue as to the value of real estate must relate to the time as of which value of the property is to be determined, or to a time so near thereto that it may reasonably throw light on the value at such time, and evidence of value at a time considerably before or after the time to which the controversy relates is not admissible unless it also appears that the value has remained the same. 31A C.J.S., Evidence, Section 182(6).

In this case the home purchased by Plaintiffs - Appellants from Defendants - Respondents was sold by Plaintiffs - Appellants more than 2 1/2 years after same had been originally delivered to Plaintiffs - Appellants. (T38:28-30) The price of the original purchase did not include the completion of a basement and the conversion of a carport into a garage. (R42:25-27; R45:16-20; R123-124) The value of the home originally received without the garage and basement completed certainly was not the same.

But the most important point is that just because the home was sold by Plaintiffs - Appellants does not mean that they need to show that the value at which they sold the home was less than they could have sold it for. Nor does it require Plaintiffs - Appellants to prove damages by the formula of the diminution in value.

Reasonable Cost of Repair Was a Proper Measure of Damages.

The damages testified to by Plaintiff - Appellant Ronald G. Mitchell were repairable. They were not permanent and irreparable damages, nor were they damages which to repair would cost unnecessary economic waste.

The proper measure of damages in this situation was the reasonable cost of repair plus any loss of use of property and other incidental and consequential damage flowing from the original defects. The fact that the roof leaked and had to be repaired, the inconvenience of the leakage, the uncomfortableness of the drafts, the inconvenience and uncomfortableness of the improperly hung doors and cabinets, all were the proper measure of damage.

Our court has said regarding damage that it should be computed in the easiest possible way. Our court has said:

Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct,

practical, and accurate method that can be employed. Even Odds Inc. vs. Nielson, 448 P2d 709, 22 U2d 49 (Utah 1968).

The most direct, practical, and accurate method for determining damage in real estate injury cases of this nature has been repeatedly stated as the cost of repair unless the injury is permanent and unrepairable.

And there is no measure of damages stated which would require a determination that the amount at which the property was subsequently sold was less than the amount at which it could have been sold.

Original Purchase and Subsequent Sale Are Two Separate Transactions Involving Two Separate Sets of Rights and Responsibilities.

Plaintiffs - Appellants bought a newly constructed home developed and built by Defendants - Respondents. Defendants - Respondents sold said newly constructed home to Plaintiffs - Appellants for a certain price. The home was to be completed in a good workmanlike manner as is recognized by implied warranties for new construction sold initially to the public. (See Annotation of liability of builder vendor or other vendor of new dwelling for loss, injury, or damage occasioned by defective condition thereof, 25 ALR3d 383, et seq.)

If the home delivered to Plaintiffs - Appellants was defective in workmanship, Plaintiffs - Appellants received less than they bargained for, and if said defects were repairable, which they were in this case, the damage to Plaintiffs - Appellants was the reasonable cost of repair.

Plaintiffs - Appellants sold their home to third parties. The transaction between Plaintiffs - Appellants and the third parties is a separate contractual arrangement and if Plaintiffs - Appellants sold said home to the third parties by fraud or misrepresentation, the third parties would have a right of action against Plaintiffs - Appellants for said fraud or misrepresentation. The right of action would still exist with the third parties to contest any impropriety in the sale of the home to them by Plaintiffs - Appellants.

But the Plaintiffs - Appellants were initially injured by the Defendants - Respondents. If the premises originally delivered to them were defective, they are entitled to compensation from Defendants - Respondents for any defects.

The third parties who purchased the property the second time are subject to all of the defenses and entitled to all of the benefits of the legal theories of caveat emptor, fraud, misrepresentation, breach of contract, etc., to recover from Plaintiffs - Appellants for any dissatisfaction they have with

the purchase contract with Plaintiffs - Appellants.

The court however, attempts to create a duty upon Plaintiffs - Appellants to advise the third parties of any alledged defects (R Subsequent Record on Appeal) when the court said in its memorandum decision of April 27, 1977, "Also, Plaintiffs did not advise the purchaser of the alledged defects they complain of in this action." The court further in its findings stated "The records show that the Plaintiffs disclaimed any liability to their grantees for any defective conditions of the house or the cement or the driveway." (R17)

The above findings are irrelevant to the issues before the court and were not properly considered.

#### Conclusion.

The consideration by the court of the subsequent sale of the home of Plaintiffs - Appellants to third parties as not correct. The court created an improper measure of damages theory.

Plaintiffs - Appellants should be entitled to damages based upon the reasonable cost of repair. The case should be remanded to determine said damage in accordance with the record.

Real property appreciates in value, certain items of

personal property appreciate in value, improvements are made to real property, and other transactions enter in after a person receives the benefit or a partial benefit of a bargain. An individual should not be precluded from damages for failure to receive the full benefit of the bargain because he subsequently sells the item received.

## POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO AWARD PLAINTIFFS THEIR COSTS FOR SUCCESSFULLY DEFENDING AGAINST THE COUNTERCLAIMS OF DEFENDANTS.

The counterclaims brought by Defendants were (1) that Plaintiffs - Appellants owed Defendants - Respondents compensation not yet paid for completion of the basement and conversion of a carport into a garage on the home purchased by Plaintiffs - Appellants from Defendants - Respondents, and (2) Plaintiffs - Appellants trespassed upon property owned by Defendants - Respondents by constructing a concrete wall thereon. (R123-127)

Both of these counterclaims were dismissed by the court at trial without the necessity of Plaintiffs - Appellants putting on a defense. (T48, 49, & 61)

Plaintiffs - Appellants feel that they were entitled to award of costs in successfully defending against said counterclaims. Said award of costs is provided for in Rule 54(d)(1) of the Utah Rules of Civil Procedure, as amended and states:

Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. Rule 54(d)(1), URCP, as amended.

The court did make no directions in its Decision,

Findings, Conclusions, or Judgment that costs should not be awarded to Plaintiffs - Appellants for prevailing on their counterclaims.



### POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO AWARD PLAINTIFFS THEIR EXPENSES INCLUDING REASONABLE ATTORNEY FEES FOR PROVING THE TRUTHFULNESS OF REQUESTS FOR ADMISSIONS DENIED BY DEFENDANTS PERTAINING TO THE COUNTERCLAIMS OF DEFENDANTS DISMISSED AT TRIAL.

At the end of the trial herein, Plaintiffs - Appellants moved the court for an order awarding Plaintiffs - Appellants their expenses including reasonable attorney fees for proving the truthfulness of Requests for Admissions denied by Defendants - Respondents. (T63-64)

Plaintiffs - Appellants feel that the court erred in failing to pass upon said motion by either denying or affirming same. The court failed in its Decision, Findings, Conclusions, or Judgment to render decision regarding said motion. (R Supplemental Record on Appeal; 16-17; and 15)

Rule 37(c) URCP, as amended, states:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the Admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectional pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there

was other good reason for the failure to admit.  
Rule 37(c), URCP, as amended.

The court made no such findings as required by the rule and Plaintiffs - Appellants feel that they are entitled to Findings by the court, Conclusions, and granting or denial of their Motion.

Plaintiffs - Appellants also feel that since the counter-claims of Defendants - Respondents were dismissed after the allegations of same proved fruitless, their expenses including reasonable attorney fees should have been awarded by the court or at least Findings, Conclusions, and and Order made regarding their motion for same.

## CONCLUSION

The major point of contention of Plaintiffs - Appellants is that the court erred in looking at the subsequent sale of the home in question to third parties, that the court considered an improper measure of damages, and that the proper measure of damages should have been the reasonable cost of repair.

The question of awarding of costs when an individual prevails on a counterclaim and the question of making Findings, Conclusions, and an Order denying or granting an Order under Rule 37(c) are fundamental and the requirement to do so should be made clear by the Supreme Court.

THEREFORE, PLAINTIFFS - APPELLANTS PRAY that this case be remanded to the court to determine damages in accordance with the reasonable cost of repair, and in validating the court's mistaken measure of damages.

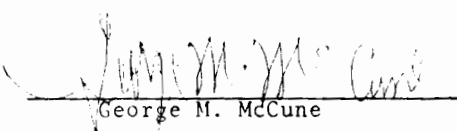
Respectfully Submitted,

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CERTIFICATE OF MAILING

Mailed 2 copies of the foregoing Brief of Appellants to  
Mr. Dallas H. Young, Jr., Attorney at Law, 48 North University  
Avenue, Provo, Utah 84601, on this 1st day of  
September, 1977.

  
George M. McCune